

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANTONIO DWAYNE HALBERT, :

4 Petitioner :

5 v. : No. 03-10198

6 MICHIGAN. :

7 - - - - -X

8 Washington, D.C.

9 Monday, April 25, 2005

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 DAVID A. MORAN, ESQ., Detroit, Michigan; on behalf of the
15 Petitioner.

16 BERNARD E. RESTUCCIA, ESQ., Lansing, Michigan; on behalf
17 of the Respondent.

18 GENE C. SCHAERR, ESQ., Washington, D.C.; on behalf of
19 Louisiana, et al., as amici curiae, supporting the
20 Respondent.

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25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAVID A. MORAN, ESQ.	
4	On behalf of the Petitioner	3
5	BERNARD E. RESTUCCIA, ESQ.	
6	On behalf of the Respondent	29
7	GENE C. SCHAERR, ESQ.	
8	On behalf of the Louisiana, et al.,	
9	as amici curiae, supporting the Respondent	49
10	REBUTTAL ARGUMENT OF	
11	DAVID A. MORAN, ESQ.	
12	On behalf of the Petitioner	58
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
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16
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Antonio Dwayne Halbert v. Michigan.

Mr. Moran.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF THE PETITIONER

MR. MORAN: Mr. Chief Justice, and may it please
the Court:

The issue in this case is whether, 42 years
after this Court decided in Douglas v. California that
indigent defendants have the right to the assistance of
counsel for a first-tier direct felony appeal --

JUSTICE O'CONNOR: Well, now, Douglas didn't
involve a guilty plea, I guess.

MR. MORAN: It did not, Your Honor. It was a
trial case.

JUSTICE O'CONNOR: And did the Court say
anything about the effect of having it be a guilty plea?
I guess it didn't.

MR. MORAN: It did not. None of this Court's
cases in the Douglas line have turned on whether the
conviction was by trial or by plea.

JUSTICE O'CONNOR: Does that make a difference
or could it?

1 JUSTICE SCALIA: Why didn't he waive the right
2 to have counsel for that -- for that purpose since that
3 was the law in Michigan?

4 MR. MORAN: Well, he did not -- first of all, as
5 a matter of fact, he did not. He was never told at any
6 point during the plea proceedings that he would be giving
7 up his right to counsel.

8 JUSTICE SCALIA: Well, he was told what -- what
9 right to counsel he would have and it didn't include this.

10 MR. MORAN: He was told that under certain
11 circumstances the judge would appoint counsel.

12 JUSTICE SCALIA: Right.

13 MR. MORAN: But the judge never said, under any
14 other circumstances, I will not appoint counsel.

15 CHIEF JUSTICE REHNQUIST: Well, isn't that a
16 perfectly natural inference if you're told you get A and
17 B, that C and D might have been -- that C and D will not
18 be given?

19 MR. MORAN: It might be a natural inference for
20 somebody with a level of sophistication, but Mr. Halbert
21 is a special education student, functionally illiterate.
22 And nobody explained to him that he wouldn't be given his
23 right to counsel.

24 JUSTICE KENNEDY: Well, did we take this case on
25 the ground that he wasn't adequately advised or did we

1 take the case on the ground that even if he were advised,
2 he'd still have his right?

3 MR. MORAN: I hope the latter, Justice Kennedy,
4 because this is a case in which the State is making a
5 waiver argument. And, of course, the waiver argument is
6 not part of -- is not the intent of the statute. What the
7 statute does is it tacks on and, by the way, the defendant
8 should be advised at the time of the plea that they won't
9 be getting counsel.

10 JUSTICE KENNEDY: Well, I -- I take it you would
11 challenge the validity of the waiver even if he were
12 advised?

13 MR. MORAN: Absolutely.

14 JUSTICE KENNEDY: And even if he said, I hereby
15 waive?

16 MR. MORAN: Absolutely, we would because that is
17 a waiver that is designed to extract only from the poor.
18 That waiver has no effect whatsoever on those with money
19 because, in fact, a money defendant is not even eligible
20 for appointed counsel on appeal. So that waiver has no
21 effect whatsoever on --

22 JUSTICE SOUTER: Well, wouldn't -- I'm -- I'm
23 sorry.

24 MR. MORAN: It would have no effect whatsoever
25 on money defendants I'm saying.

1 JUSTICE SOUTER: Wouldn't your position be
2 different if he had been advised that he had exactly the
3 right that you claim he has, and the court said, however,
4 in Michigan you may not enter the -- the plea unless you
5 waive that right? If -- if you don't want to waive that
6 right, which I've just explained to you, we'll -- we'll
7 have a trial. Would -- would your answer still be that --
8 that waiver would be as a matter of law impossible?

9 MR. MORAN: The waiver would be unconstitutional
10 under those conditions because it is a discriminatory
11 waiver. To show how breathtaking the State's argument --

12 JUSTICE KENNEDY: How -- why is that prejudicial
13 to him? He says, okay, I can't plead guilty. I really
14 did it but I can't plead guilty.

15 MR. MORAN: I'm sorry.

16 JUSTICE KENNEDY: Why doesn't he just have a
17 trial? He says, I'm not going to contest the trial.

18 MR. MORAN: Well, as this Court has long
19 recognized, a trial provides very substantial benefit. I
20 mean, excuse me. A guilty plea provides very substantial
21 benefits. And so the effect of the Michigan statute then
22 would be only the money defendant can receive the benefits
23 of a guilty plea and then have sentencing errors
24 corrected.

25 JUSTICE KENNEDY: I thought you were going to

1 say to Justice Souter, before I interrupted, that it's --
2 that it's far-reaching.

3 MR. MORAN: Yes. Well, not only that, if the
4 State's waiver argument is correct, then presumably the
5 State could extract a waiver saying you can't have free
6 transcripts. You can't have the waiver of the filing
7 fees. In fact, the State could extract a waiver saying
8 you can't have counsel at sentencing.

9 JUSTICE SCALIA: These are all disparate impact
10 arguments. There's -- there's -- you're not making any
11 argument that the State intentionally discriminates
12 against the poor. You're just saying the effect of this
13 is harder on the poor than it is on the rich. But I
14 thought our -- our equal protection cases have -- have
15 said that disparate impact doesn't -- doesn't hack it as
16 far as equal protection is concerned.

17 MR. MORAN: Well, Justice Scalia, I actually
18 have two responses to that. First, this is intentionally
19 aimed at the poor. Looking at 770.3a, the statute under
20 -- in question here, it is clearly aimed at the indigent.
21 It refers to the indigent. So this is a statute that on
22 its face is -- is taking away the right of the indigent
23 and only the indigent to have -- have an attorney. So I
24 don't agree that is is a -- simply a disparate impact
25 case.

1 But in the context of appellate counsel for a
2 first-tier felony appeal, this Court's cases have -- have
3 not applied the same line of analysis that this Court has
4 applied in other contexts, and I think that's quite clear
5 most recently in the MLB case --

6 JUSTICE GINSBURG: In any event, you pointed out
7 that on the face there is the distinction on the face of
8 it --

9 MR. MORAN: Yes.

10 JUSTICE GINSBURG: -- it is not a disparate
11 impact case at all --

12 MR. MORAN: Yes.

13 JUSTICE GINSBURG: -- because it affects only
14 indigents.

15 MR. MORAN: Yes. There is no question that this
16 statute was enacted for and specifically applies only to
17 the indigent. It has -- it has no impact whatsoever on
18 the wealthy, and it's aimed at the -- at the indigent
19 only. So I do -- I do not agree that this --

20 JUSTICE SCALIA: Whenever a State has -- has
21 initially given a broad benefit to the poor, whenever it
22 cuts back on poor -- on part of that benefit, it is
23 denying equal protection to the poor? That -- that seems
24 to be an extraordinary proposition. The State isn't
25 picking on the poor. It's just saying that -- that the --

1 the free counsel we have agreed to provide in the past
2 we're no longer going to provide in this -- in this one
3 instance of guilty pleas. And -- and you say that -- that
4 is intentional discrimination against the poor?

5 MR. MORAN: It's not a -- a disparate impact
6 claim I say, because it is intentionally aimed at the
7 poor. The statute was designed to take away counsel from
8 the poor and only from the poor.

9 JUSTICE SCALIA: So any cutback on benefits that
10 is given -- on benefits that are given to the poor is
11 intentional discrimination against the poor.

12 MR. MORAN: I'm not saying any, Justice Scalia.

13 JUSTICE SCALIA: Just this one because that's
14 your case.

15 MR. MORAN: This case certainly is.

16 JUSTICE GINSBURG: You're saying this is case
17 like Douglas which was equal protection, like a free
18 transcript, like a filing fee for an appeal.

19 MR. MORAN: Yes.

20 JUSTICE GINSBURG: You're bracketing --

21 MR. MORAN: This case -- in many ways the
22 restrictions that are placed on the indigent's ability to
23 appeal in Michigan, as a result of this statute, are worse
24 than those that were struck down in Douglas because at
25 least in Douglas the court, the appellate court, would

1 review the entire transcript, looking for arguable issues.
2 We don't even have that here.

3 All we have here is the indigent forced to shift
4 for himself, forced to try and determine whether there are
5 any issues, forced to order his own transcript. Under the
6 Michigan statute, the indigent has to figure out how to
7 obtain his or her docket entries, his or her transcripts,
8 his or her prisoner account statements, all the documents
9 necessary for filing a first appeal that would ordinarily
10 be done by counsel. And so --

11 JUSTICE STEVENS: May I just understand one
12 point that Justice Scalia's question raises for me? In
13 your view, is the provision of counsel for the indigent
14 for appellate purposes purely a matter of grace, or was
15 there some underlying obligation to provide counsel?

16 MR. MORAN: Oh, it's my -- it's certainly my
17 contention, Justice Stevens, that Michigan is required to
18 afford appellate counsel in this situation for a first-
19 tier direct felony appeal on the merits.

20 JUSTICE SOUTER: So that ultimately your case
21 rests not on equal protection but due process.

22 MR. MORAN: It's a merger of both principles, as
23 this Court said --

24 JUSTICE SOUTER: But it's one as much as the
25 other, isn't it?

1 MR. MORAN: Yes.

2 JUSTICE SOUTER: I mean, you're -- we're saying
3 if you're going to provide a first appeal of right, one
4 incident of that is, as a matter of due process, you've
5 got to provide counsel.

6 MR. MORAN: Yes, Justice Souter.

7 JUSTICE SCALIA: So you're -- you're retracting
8 the pure equal protection claim? I don't think you want
9 to do that. I mean, you would say that even if there were
10 not a due process right, you would still regard this as --
11 as directed against the poor.

12 MR. MORAN: It is directed --

13 JUSTICE SCALIA: Or not?

14 MR. MORAN: It is directed against the poor,
15 which is why there is an equal protection component to
16 this argument, but this Court's cases --

17 JUSTICE SCALIA: But you say that component
18 wouldn't exist unless you begin with a due process right
19 to have counsel on appeal.

20 MR. MORAN: I believe that's right. It's --
21 it's difficult -- I have to confess, Your Honor, it's
22 difficult sometimes to separate out the due process and
23 equal protection strands from the Griffin and Douglas, and
24 this Court most recently in MLB said that there is a
25 certain merger. Also, I believe in Smith v. Robbins this

1 Court reiterated that there is a certain merger of the
2 lines in these cases. But --

3 JUSTICE SOUTER: You're -- you're saying that
4 the due process is what gets you beyond the stage of
5 merely providing counsel as a matter of grace. That's
6 what due process does for you. Because they have to
7 provide counsel not merely as a matter of grace, you have
8 a very clear equal protection case which you would not
9 otherwise have. Isn't -- isn't that the way the two work
10 together?

11 MR. MORAN: I think that's right, Justice
12 Souter. I think I agree with that.

13 JUSTICE KENNEDY: Can -- in your view, can the
14 State require a waiver of the right to appeal for
15 everyone?

16 MR. MORAN: That's a question this Court hasn't
17 decided, and I don't have a position on that. But that's
18 far different from this case because that would not be
19 discriminatory.

20 JUSTICE KENNEDY: Well, I'm not so sure. It
21 certainly goes to the importance of the significance of
22 the underlying right. My understanding is -- correct me
23 if I'm wrong -- that in the Federal system, we require
24 waivers of the right to appeal frequently, even waiver of
25 the right to appeal the sentence even before the sentence

1 is calculated, as I understand it.

2 MR. MORAN: Yes.

3 JUSTICE KENNEDY: And do you question the
4 lawfulness of that?

5 MR. MORAN: I don't. And that -- that case has
6 not come before this Court yet, and so I don't know how
7 this Court would decide that case if it comes. I know
8 some of the Federal circuits have upheld such appellate
9 waivers as a part of a negotiated guilty plea.

10 One thing the Michigan statute is -- does is it
11 takes away the right to appeal effectively for indigents
12 without negotiation. It's -- it's the baseline.

13 JUSTICE SCALIA: But, Mr. Moran, if -- if you're
14 -- if you're tying your equal protection claim to a due
15 process claim and if it is not a violation of due process
16 to require people to waive their -- I mean, you can waive
17 entirely the right to appeal. Surely you can waive the
18 right to counsel on appeal. If that's not a violation of
19 due process, then your equal protection claim dissolves.

20 MR. MORAN: But, Your Honor, the problem is --
21 is that the statute requires only the poor, imposes a
22 forced waiver on only the poor.

23 JUSTICE SCALIA: That's an equal protection
24 claim.

25 MR. MORAN: That's an equal protection claim.

1 JUSTICE SCALIA: But you've -- you've said your
2 equal protection claim hinges on the due process claim.
3 If the due process claim, in turn, hinges upon waiver,
4 then apart from the -- from the dispute in this case as to
5 whether waiver occurred or not, if waiver does occur,
6 there's no due process claim, and then there's no equal
7 protection claim.

8 MR. MORAN: I'm really not sure that you can
9 separate out the two strands of the Fourteenth Amendment
10 again, and I know this Court didn't try in MLB, and I know
11 this Court didn't try in Smith v. Robbins, so that there
12 is -- there is a component of both. And it's precisely
13 because of these sorts of questions that I think you have
14 to view them as an integrated whole for purposes of the
15 Griffin/Douglas line.

16 JUSTICE SOUTER: In any case --

17 JUSTICE O'CONNOR: Where -- where do we find the
18 waiver here? Is it in the joint appendix?

19 MR. MORAN: Well, it's my position there was no
20 waiver, but the --

21 JUSTICE O'CONNOR: But you referred to something
22 that was waived.

23 MR. MORAN: Yes.

24 JUSTICE O'CONNOR: Where would we find that?

25 MR. MORAN: Well, the plea proceeding. It's the

1 plea proceeding. And it's --

2 JUSTICE O'CONNOR: Well, don't take your time to
3 look it up. Maybe counsel for respondent can find it for
4 us.

5 MR. MORAN: It's -- it's in the joint
6 appendix --

7 JUSTICE O'CONNOR: All right.

8 MR. MORAN: -- beginning on page 19.

9 JUSTICE SCALIA: It's their argument anyway.
10 Let them --

11 JUSTICE BREYER: I'm missing something on
12 waiver, but I would have thought a person can waive a -- a
13 right to have a counsel on appeal. He can waive a trial.
14 He can waive a jury trial. But before he has to -- before
15 he decides, he has to know that he has the constitutional
16 right to a jury trial.

17 MR. MORAN: That's right.

18 JUSTICE BREYER: And why wouldn't he also have
19 to have the -- to know that he has the constitutional
20 right to a lawyer to represent him?

21 MR. MORAN: Well, that's my position --

22 JUSTICE BREYER: All right. That has nothing to
23 do with equal protection. It has to do simply with a very
24 common sense rule that we apply in every case, jury trial,
25 et cetera. So all we'd have to say is, of course, he has

1 a right to a lawyer.

2 Now, if he wants to go back and waive that
3 right, fine.

4 MR. MORAN: That's right.

5 JUSTICE BREYER: That's all. That's the end of
6 it.

7 MR. MORAN: That's right.

8 JUSTICE BREYER: So what's all this complicated
9 thing about?

10 MR. MORAN: If an indigent, after being
11 sentenced, decided for whatever reason I would prefer to
12 go on appeal by myself, which is actually a -- a right
13 this Court rejected in Martinez, that you have a right to
14 represent yourself on appeal, but in Michigan an indigent
15 is allowed to -- would be allowed to represent himself or
16 herself on appeal if they chose to do so. The problem
17 here is that the statute purports to take away the right,
18 and it's our position that this is a --

19 JUSTICE BREYER: No, no. You'd have to say the
20 statute is wrong in taking away the right.

21 MR. MORAN: Yes.

22 JUSTICE BREYER: But he can waive it if he wants
23 to, knowing that he has the right.

24 MR. MORAN: That's right. We have no problem
25 with a voluntary waiver. We certainly have a problem with

1 a forced waiver saying that you cannot enter a plea which
2 produces tremendous benefits in Michigan, as everywhere
3 else, unless -- unless you agree to waiver --

4 JUSTICE SCALIA: Oh, but -- but that happens all
5 the time. I mean, the waiver -- waiver of appeal in -- in
6 guilty -- in guilty pleas. That's -- that's not
7 permissible either?

8 MR. MORAN: I take no position on that. It may
9 or may not be permissible.

10 JUSTICE SCALIA: Well, you have to if you're
11 going to make the argument you just made.

12 MR. MORAN: But it's far different because
13 that's something that can be obtained in negotiation. But
14 what we would have --

15 JUSTICE O'CONNOR: Well, Mr. Moran, here on page
16 22 of the joint appendix, the court is speaking to the
17 defendant and says, you understand if I accept your plea,
18 you are giving up or waiving any claim of an appeal as of
19 right.

20 MR. MORAN: Yes.

21 JUSTICE O'CONNOR: And you think that was not
22 effective?

23 MR. MORAN: No. That was effective. That --
24 that's referring to the automatic appeal that he would
25 have if he went to trial where he would have full briefing

1 and oral argument. The Michigan --

2 JUSTICE O'CONNOR: Well, I -- it doesn't say
3 that.

4 MR. MORAN: No, it doesn't. This was a -- this
5 was a pretty poor waiver proceeding in a number of -- of
6 respects, but it --

7 JUSTICE KENNEDY: Well, he does --

8 JUSTICE O'CONNOR: I'm --

9 JUSTICE KENNEDY: -- he does go on to say that
10 -- that he can appoint a lawyer for -- in certain
11 instances. He doesn't complete the explanation by saying
12 there are other instances and when I will not appoint one.
13 That he leaves out, although this a represented defendant.

14 MR. MORAN: Yes, he was.

15 JUSTICE KENNEDY: He had a counsel at the plea.

16 MR. MORAN: He did.

17 JUSTICE BREYER: I'm mixed up again. What is
18 the answer to this? I -- I would have thought that even
19 if those words that Justice O'Connor read referred
20 directly to the kind of appeal that we have in front of us
21 -- in other words, the one that's at issue -- that still
22 he'd have to know he has a right to a lawyer on that
23 appeal before he could waive it.

24 MR. MORAN: Yes, Justice Breyer, I agree.

25 JUSTICE BREYER: And does anybody dispute that?

1 MR. MORAN: I believe --

2 JUSTICE BREYER: Is that at issue here?

3 MR. MORAN: I -- I believe the State might
4 dispute that. I'm not sure.

5 What the Michigan constitution does, Justice
6 O'Connor, if I may come back to your question, is it says
7 that for somebody who pleads guilty or nolo contendere,
8 they are giving up the right to the automatic appeal, and
9 they have -- they then have to proceed by the application
10 for leave to appeal. And so the Michigan constitution
11 explicitly still provides a right to appeal, but it
12 changes the method. And so Michigan's appeal, after a
13 guilty plea now, is like the first appeal in several other
14 States, Virginia, West Virginia, and -- and several other
15 States have guilty plea appeals.

16 JUSTICE SCALIA: That's a strange terminology.
17 It doesn't provide a right to appeal. It -- it provides a
18 right to apply for an appeal, a right to ask for an
19 appeal. A right to ask for an appeal is not a right to
20 get an appeal.

21 MR. MORAN: It's framed in terms of a -- of a
22 right. Page 2 of the brief --

23 JUSTICE SCALIA: So you have an absolute right
24 to ask for an appeal.

25 MR. MORAN: Yes.

1 JUSTICE SCALIA: But that's not a right to
2 appeal. It's a right to request an appeal, which can be
3 granted or denied.

4 MR. MORAN: Yes.

5 JUSTICE SCALIA: Okay.

6 MR. MORAN: But it's a -- it's -- what Michigan
7 has done is it has changed the method of the appeal. And
8 so Virginia, for example, has first-tier appeals by
9 petition. West Virginia has a first-tier by petition
10 and --

11 JUSTICE SCALIA: Well, it's done more than
12 change the method. It's changed the entitlement. The
13 court can simply say we're not interested in your appeal.
14 It doesn't raise a significant legal issue.

15 MR. MORAN: Yes, Justice Scalia, but that's not
16 how the -- the Michigan Court of Appeals works. The
17 Michigan Court of Appeals is an error-correcting court.
18 And so in Mr. Halbert's case, the Michigan Court of
19 Appeals denied his appeal, after his futile attempt to --
20 to identify his issues, with an order saying that there
21 was a lack of merit in the grounds presented. That is a
22 preclusive decision on the merits of his case. That --

23 JUSTICE GINSBURG: That's just -- but that's
24 just boiler plate, isn't it? That's what they say in all
25 these cases.

1 MR. MORAN: Yes.

2 JUSTICE GINSBURG: And I think Michigan cites a
3 Michigan Supreme Court decision that says it's not on the
4 merits.

5 MR. MORAN: That --

6 JUSTICE GINSBURG: It's People v. Berry?

7 MR. MORAN: Yes. That was a decision of the
8 Michigan Supreme Court referring to its own orders denying
9 applications for leave to appeal which are not on the
10 merits. The Michigan Supreme Court denies the
11 applications for saying -- by saying, we are not persuaded
12 that we should hear the questions presented.

13 JUSTICE GINSBURG: Well, why wouldn't it be the
14 same if the -- if it's a discretionary appeal at the
15 intermediate appellate level?

16 MR. MORAN: Because the Michigan Court of
17 Appeals, unlike the Michigan Supreme Court, is an error-
18 correcting court. And so it issues orders saying denied
19 for lack of merit. And the Michigan Court of Appeals
20 dozens and dozens of times in the last 25 years has said,
21 without exception, that is a decision on the merits that
22 precludes relitigation under the law of the case doctrine.

23 JUSTICE SCALIA: Didn't -- didn't the supreme
24 court in the Bulger case -- was that the name of it?

25 MR. MORAN: Yes.

1 JUSTICE SCALIA: Didn't it say that the -- that
2 the intermediate court's denial of -- of appeals was a
3 discretionary judgment?

4 MR. MORAN: It called it a discretionary appeal,
5 Justice Scalia, without ever explaining why, and the --
6 the dissent in Bulger pointed out the Michigan Court of
7 Appeals is an error-correcting court. And in fact, the
8 very author of the --

9 JUSTICE SCALIA: That was a dissent, though.

10 MR. MORAN: That's right, but the very author of
11 the opinion in Bulger, Chief Justice Corrigan, just 1 year
12 later or 2 years later describes the effect of -- of an
13 order denying leave to appeal in the Michigan Court of
14 Appeals, and says it clearly shows they considered and
15 rejected the merits.

16 JUSTICE SOUTER: So, in effect, it's
17 discretionary in the sense that it's discretionary as to
18 whether to give it full-dress treatment, but the bottom
19 line, whether they give it full dress or -- or merely
20 discretionary denial is -- is an implication on the
21 merits.

22 MR. MORAN: Yes, exactly as in Virginia. In
23 Jackson v. Virginia, the Court recognized that the -- the
24 Virginia situation is exactly the same, that there is a
25 petition to appeal to the Virginia Court of Appeals, and

1 JUSTICE SCALIA: Federal courts do?

2 MR. MORAN: Yes.

3 JUSTICE SCALIA: They assume that all factual
4 and legal arguments have been decided against the -- the
5 person applying for a discretionary appeal?

6 MR. MORAN: Yes. After Abela v. Martin in the
7 Sixth Circuit. And there is a -- a whole host of Federal
8 district court decisions in the Eastern and Western
9 District of Michigan all saying that when an order is
10 denied for lack of merit in the grounds presented, the
11 AEDPA standard of review applies.

12 And so the State obtains tremendous benefits
13 from this procedure. They obtain deference on habeas
14 corpus review. They prevent the indigent, if the indigent
15 were to ever get a lawyer at some later stage, from
16 beginning relitigation on State collateral review. And so
17 the State very happily argues for all of those purposes
18 that this is a decision on the merits, but then they come
19 before this Court and they say, oh, no, it's not a
20 decision on the merits. It's really discretionary despite
21 what it says because they are hoping that this Court will
22 conclude that it is a discretionary appeal.

23 In fact, the State --

24 JUSTICE GINSBURG: Mr. Moran.

25 MR. MORAN: -- has made an even more radical

1 argument in its brief. The State maintains that the
2 appeal to the Michigan Court of Appeals is a second-tier
3 appeal, and that is plainly contrary to the -- to the
4 actual function of that court because there is a provision
5 that if trial counsel suddenly realizes in a plea case,
6 after sentencing, that there are issues that she should
7 have raised, it allows her to do that. And so the State
8 now argues that that's really the first-tier appeal, and
9 then the application that follows after that to the
10 Michigan Court of Appeals is a second-tier appeal.

11 I'll just point out that even the State's amicus
12 doesn't agree with that, and -- and rightfully so in light
13 of Swenson v. Bosler, which has rejected an attempt to
14 reorganize by labeling how one's appeals go.

15 JUSTICE GINSBURG: Mr. Moran, before your --
16 your time is up, I did want to know what is your position
17 on -- let's say that there is -- you prevail and there is
18 a right to counsel for these applications to appeal. And
19 if counsel looks at the case and determines that there is
20 no tenable ground for an appeal, could counsel file the
21 equivalent of an Anders brief?

22 MR. MORAN: Yes. Yes, Justice Ginsburg, and in
23 fact, I have done that personally. Before I became an
24 academic, I worked at the State Appellate Defender Office
25 in Detroit and was appointed to represent indigents on

1 plea appeals. And in a significant percentage of the
2 cases -- I can't quote you the numbers off the top of my
3 head -- after reviewing the case, the appellate counsel
4 then concludes that there is no merit, that there are no
5 grounds to proceed, that the defendant in fact got
6 whatever it was she bargained for in the plea bargaining,
7 at which point then either a motion to withdraw may be
8 filed or -- or the equivalent, the Michigan equivalent, of
9 an Anders brief. And so that is done in a number of
10 cases.

11 It is our position that that procedure actually
12 helps improve the appellate process in Michigan because
13 without that process, all you have are indigents like Mr.
14 Halbert, a special education student with mental
15 disabilities, trying to identify his own issues and fall
16 -- and filing, in -- in his case, with the help of a
17 fellow prisoner because he could not have done it himself
18 -- the help of a fellow prisoner, an application that is
19 completely incoherent, misses several issues that are
20 right on the face of the record, correctly asserts that
21 his sentencing guidelines were misscored but -- but
22 without explaining why, without even identifying which
23 sentencing guidelines were misscored.

24 And in fact, he received a minimum sentence that
25 was approximately three times too high under the

1 sentencing guidelines. The State concedes that one of the
2 sentencing guidelines was scored in the State's favor
3 erroneously. We concede one of the -- one of the
4 sentencing guidelines was scored in Mr. Halbert's favor
5 erroneously. But then there were two others, and the most
6 important ones, the OV, Offense Variable, 13. That was
7 scored for 25 points in both cases. And so Mr. -- Mr.
8 Halbert, in fact, received a sentence that was much too
9 high.

10 Michigan requires -- Michigan is one of the few
11 States that requires that ineffective assistance of
12 counsel claims be raised on direct appeal or they're lost.
13 And so at that point, Mr. Halbert had to figure out a way
14 to raise an ineffective assistance of counsel hearing,
15 which requires an evidentiary hearing at which trial
16 counsel must be called, assuming trial counsel is still
17 available to be called, all from prison, and there was no
18 possible way he could do that. So it's not very
19 surprising that even with the help of a fellow inmate,
20 that his application for leave to appeal was completely
21 incoherent.

22 The fellow inmate actually did write the -- the
23 trial judge and say we need to have an evidentiary hearing
24 on ineffective assistance of counsel. But under the
25 statute, the judge had no discretion to grant that motion.

1 Under the statute, only if there was already an upward
2 departure from the sentencing guidelines, only then would
3 the judge be required to appoint counsel, and of course,
4 the guidelines, as misscored without objection from
5 defense counsel -- there was no upward departure at that
6 point.

7 If the Court has no further questions, I'd like
8 to reserve the balance of my time.

9 CHIEF JUSTICE REHNQUIST: Very well, Mr. Moran.
10 Mr. Restuccia.

11 ORAL ARGUMENT OF BERNARD E. RESTUCCIA

12 ON BEHALF OF THE RESPONDENT

13 MR. RESTUCCIA: Mr. Chief Justice, and may it
14 please the Court:

15 I want to start with the factual claim regarding
16 the waiver that the Court identified, pages 22 and 23 from
17 the joint appendix, being the point at which Mr. Halbert,
18 in fact, waived his right to the appointment of appellate
19 counsel. I think Justice Scalia is right in noting that
20 he was told specifically it's under these conditions
21 you'll be appointed a counsel; under these conditions, you
22 might be appointed counsel. From context it's unambiguous
23 that he would otherwise not receive counsel.

24 And what's important is at the joint appendix on
25 page 45, the trial court, in fact, made a factual finding

1 on this point. So in order for this Court to conclude
2 that Mr. Halbert did not waive his right to appellate
3 counsel under the particular circumstances, you would have
4 -- you would have to conclude that the trial court was
5 clearly erroneous in its factual finding.

6 JUSTICE SOUTER: Well, I mean, wouldn't we have
7 to conclude that if we're going to apply the same
8 standards here that we usually do in -- in the plea waiver
9 situation? I mean, we -- the -- the classic point of it
10 all is the knowing -- the -- the intelligent, voluntary
11 waiver of a known right. And leaving aside the equal
12 protection problem here, even if we didn't have that, I
13 don't see that there would be -- have been an adequate
14 waiver here because he was never told that he had the
15 right that he now claims as a matter of due process. You
16 indeed, dispute it.

17 MR. RESTUCCIA: Yes.

18 JUSTICE SOUTER: But unless he were told that,
19 the -- the waiver that -- that depends upon parsing the
20 difference between must and may in the two paragraphs of
21 explanation certainly wouldn't be taken as the predicate
22 for a waiver of a known right.

23 MR. RESTUCCIA: I -- I think that the colloquy
24 makes clear that he does not -- he's not going to have an
25 appeal as of right, and then when told that --

1 JUSTICE SOUTER: Well, the -- the appeal of his
2 right -- the appeal as of right point, as I understand it,
3 is a different point. What they're getting at there is it
4 will be discretionary with the reviewing court whether
5 your case is reviewed on the merits on some point if you
6 ask for it. We're here dealing with the right to counsel,
7 and it seems to me unless he were told that he had the
8 right to counsel that he claims and he then waived it,
9 that there wouldn't be a -- an -- an adequate waiver under
10 Boykin.

11 MR. RESTUCCIA: I think in -- in context when
12 told that only under these circumstances you're going to
13 receive counsel in bringing discretionary application,
14 that it's clear that he is waiving in his decision to go
15 forward with the -- his plea --

16 JUSTICE BREYER: Look, the -- imagine -- I'm
17 just repeating what Justice Souter said. There must be --
18 it's so obvious that there must be an obvious answer, but
19 I haven't heard the answer.

20 He knows Michigan law or his lawyer does. The
21 Michigan lawyer looks at the statute. It says a defendant
22 who pleads guilty shall not have appellate counsel
23 appointed for review with some exceptions, which they
24 claim are inadequate. So he thinks the law is shall not.
25 I have no right. So he doesn't not only -- not only is he

1 not waiving a known right, there's nothing for him to
2 waive. He has no such right.

3 Now, obviously, when there's nothing for him to
4 waive, how could he waive anything? And obviously, a
5 person who's told, hey, you don't have a right to appeal
6 no matter what and then he says, okay, I waive my right to
7 appeal, I mean, really.

8 MR. RESTUCCIA: I think that the -- the -- for
9 the two questions that are asked, he explains -- the court
10 explained to him he didn't have appeal as of right but
11 then said --

12 JUSTICE BREYER: Okay, that's the end of it.
13 Right?

14 MR. RESTUCCIA: But then -- and then the --
15 the --

16 JUSTICE SCALIA: But he had an appeal of right
17 until he pleaded guilty.

18 MR. RESTUCCIA: That's right.

19 JUSTICE SCALIA: And that's where -- that's what
20 the waiver consists of. To say he didn't have an appeal
21 of right, no. That's -- he had an appeal of right up
22 until the point where he pleads guilty, and that's what --
23 and that's what the judge is asking.

24 JUSTICE BREYER: Precisely.

25 JUSTICE SCALIA: Do you want to -- do you want

1 to plead guilty, even though if you plead guilty, you'll
2 get -- you'll get a lawyer only under these circumstances.

3 JUSTICE BREYER: Precisely.

4 JUSTICE SCALIA: The court didn't say only --

5 JUSTICE BREYER: And that's what we're deciding
6 is --

7 JUSTICE SCALIA: That's the problem.

8 JUSTICE BREYER: That's exactly the issue in
9 front of us. Is it constitutional or not constitutional?
10 And waiver has nothing to do with it.

11 MR. RESTUCCIA: I think that -- I also want to
12 make the point, of course, that there was a factual
13 finding, so if this Court did conclude, it would have to
14 find the trial court was clearly erroneous.

15 The --

16 JUSTICE GINSBURG: Mr. Restuccia, the -- we are
17 dealing here, as is not uncommon, with someone who is
18 learning disabled, mentally impaired, and the trial court
19 did not say if you plead, you relinquish your right to
20 counsel in seeking leave to appeal. It said only when --
21 if this exists, I must, and if that exists, I must, but
22 did not say if you plead, you relinquish your right to
23 counsel in seeking leave to appeal.

24 And I was curious as a matter of what is going
25 on in Michigan trial courts now. Do judges routinely tell

1 defendants who plead guilty -- tell them not only when the
2 court must give them counsel, but if you plead, you
3 relinquish your right to counsel in seeking leave to
4 appeal? Because that --

5 MR. RESTUCCIA: Yes.

6 JUSTICE GINSBURG: -- that was never imparted in
7 this case.

8 MR. RESTUCCIA: The advice concerning right to
9 appeal, the one that was used in the trial court here, was
10 a form from 2000. The -- the 2004 form is available from
11 the Michigan Supreme Court web site, and it has been
12 modified now that -- because the trial court -- it seems
13 apparent that he was reading from the advice concerning
14 right of -- to appeal. The way it reads now is it will
15 say you are not entitled to have a lawyer appointed at
16 public expense to assist you in filing an application for
17 leave to appeal. So this -- this -- the colloquy now
18 would happen differently, but I think that --

19 JUSTICE SCALIA: Of course, your case is a
20 little stronger than -- than the court just asked -- just
21 saying I must appoint counsel in this circumstance and I
22 must appoint counsel in another circumstance. That might
23 have left open the implication that you could appoint
24 counsel in other circumstances, but the court went on and
25 to say I might appoint counsel in this circumstance and I

1 might appoint counsel in the other circumstance. So if
2 there's any implication from it, the implication is not
3 just that I have -- I have listed all the areas in which I
4 must, but it's also I have listed all the areas in which I
5 either must or even may, if there's an implication.

6 MR. RESTUCCIA: I think -- I think that's right.

7 JUSTICE GINSBURG: Well, apparently the people
8 who -- who redid the model instructions thought that this
9 would be a clearer one, to tell him up front you don't get
10 counsel if you don't fit under these exceptions.

11 MR. RESTUCCIA: That's right. And they -- they
12 did -- they did modify the form.

13 So on the question of the underlying
14 constitutionality, I want to -- I want to make a few
15 points, that the -- the threshold question really is
16 whether there's an appeal as of right in Michigan for a
17 plea-based conviction. Michigan law is clear that there
18 is no appeal by right. It's an application process and
19 it's a discretionary review. The Michigan Court of
20 Appeals has no obligation to correct errors in these
21 cases, has no obligation to review the merits.

22 JUSTICE STEVENS: Do you agree with your
23 opponent that for AEDPA purposes, they treat the
24 intermediate decision as a decision on the merits?

25 MR. RESTUCCIA: No. The law in the Sixth

1 Circuit is in fact in conflict with a case -- an earlier
2 case, McKenzie v. Smith -- had determined that the -- a
3 decision with that language, that virtually identical
4 language, is not -- is not entitled to deference.

5 JUSTICE STEVENS: So your opponent has
6 misrepresented Michigan law.

7 MR. RESTUCCIA: No. I didn't say -- I wasn't
8 suggesting that. Abela is one case stating one position.
9 McKenzie, an earlier case, stated another position.

10 JUSTICE STEVENS: But he says there are dozens
11 of cases at the district court level that apply AEDPA in
12 the way he described. Is that wrong?

13 MR. RESTUCCIA: Well, he didn't cite those
14 cases. I --

15 JUSTICE STEVENS: No, he didn't, but do you
16 think he's wrong?

17 MR. RESTUCCIA: I -- I know that our office
18 handles all the habeas -- habeas corpus --

19 JUSTICE STEVENS: Do you think he's wrong?

20 MR. RESTUCCIA: I think he is wrong. The --

21 JUSTICE SOUTER: Are you going on -- on record
22 as saying that Michigan does not and will not, in the
23 United States courts, claim any AEDPA deference as a
24 result of one of these determinations?

25 MR. RESTUCCIA: The Solicitor General made that

1 position clear before the argument -- before this Court in
2 Tesmer v. Kowalski. So we have not been advancing that
3 claim. In fact, we've been advancing a claim --

4 JUSTICE SOUTER: And you have not been -- and --
5 and Michigan lawyers have not been advancing that claim in
6 the district courts?

7 MR. RESTUCCIA: The -- all the habeas petitions
8 are run through the office of the Attorney General, so
9 that the -- when the Solicitor General from the State of
10 Michigan instructed our staff not to advance that claim,
11 that means all habeas cases in Michigan essentially there
12 will be -- that argument will not be advanced.

13 JUSTICE SOUTER: So, so far as you can tell,
14 that's the way it's been.

15 MR. RESTUCCIA: That's right. That's right.

16 And because there is no appeal as of right under
17 Michigan law, this -- the Douglas case doesn't govern the
18 disposition. Ultimately the -- the controlling is Ross.
19 And the issue then is whether Michigan provides a
20 meaningful access to an indigent defendant who wants to
21 bring an application for leave. That's really the -- I
22 think the heart of the constitutional issue.

23 There are three distinct characteristics of the
24 Michigan system. The -- the nature of the review is
25 discretionary, and I think comparable to the kind of

1 review in Ross that was described by this Court for the
2 North Carolina Supreme Court.

3 Mr. Moran makes a claim that the Michigan Court
4 of Appeals is an error-correcting court. With regard to
5 applications for leave where there is no right to have the
6 merits reviewed, it is not an error-correcting court. In
7 fact, one of the reasons for the legislation in Michigan,
8 the reason the Michigan constitution was changed was
9 because of the heavy volume that the Michigan Court of
10 Appeals was facing. There are 28 judges in the Michigan
11 Court of Appeals, and they produce --

12 CHIEF JUSTICE REHNQUIST: Do they all sit
13 together?

14 MR. RESTUCCIA: No. They're panels of three.
15 They issue about 4,000 opinions each year. So each judge
16 is responsible for authoring --

17 CHIEF JUSTICE REHNQUIST: But it's just one
18 court.

19 MR. RESTUCCIA: One court. That's right. So
20 each judge is responsible for authoring between 130-140
21 opinions, having to join in another 280. So resource
22 allocation is one of the pressing concerns in the Michigan
23 Court of Appeals.

24 The situations in which the court of appeals
25 will grant leave on application are rare. It's -- it's

1 reluctant to grant leave in these cases in part because of
2 the --

3 JUSTICE GINSBURG: Then why -- if it's just
4 denying -- or not granting appeal, why does it use the
5 boiler plate, for lack of merit in the grounds presented?

6 MR. RESTUCCIA: It's used that standard order
7 for the last 20 years or longer. The only Michigan Court
8 of Appeals case in -- only published case in an
9 application for leave setting is the Bobenal case cited by
10 the people in our -- the State of Michigan in its brief,
11 in which the Michigan Court of Appeals said there is no --
12 this is not a determination on the merits.

13 The only published case for Michigan in which
14 there was an application for leave from a plea-based
15 conviction is People v. Berry in which the Michigan Court
16 of Appeals, after initially having denied leave, then in a
17 collateral attack granted leave on the very same issue and
18 said that its original --

19 JUSTICE BREYER: Why -- sorry. Finish. I just
20 had a -- I wanted to go back to something you said, but I
21 want you to be finished.

22 JUSTICE SCALIA: Could I ask about grounds
23 presented before we get off this? Is it conceivable that
24 the lack of merit in the grounds presented means lack of
25 merit in the -- in the grounds of application? Is -- is

1 the applicant required to state why this particular appeal
2 is worthy of being entertained?

3 MR. RESTUCCIA: They're supposed to raise those
4 arguments. I think that's exactly right, that merits can
5 have different meanings, and it can -- it can relate to
6 whether it would justify the resources of the court to
7 examine the underlying merits of the claim. I think
8 that's right.

9 That's one understanding of the -- of the order
10 that's consistent with the way it's been treated by the
11 court of appeals and also, most importantly, by the
12 Michigan constitution, when the people of the State of
13 Michigan said trial-based convictions, there's an appeal
14 as of right. For all other convictions, for plea-based
15 convictions, it would be by leave. And Michigan's Supreme
16 Court, in examining this very question about the nature of
17 review, said that it was discretionary.

18 JUSTICE GINSBURG: What of Mr. -- Mr. Moran's
19 point that this -- whatever the merits are, it counts as
20 law of the case and it's -- it conclusively determines the
21 issues presented?

22 MR. RESTUCCIA: That's not what happened in --
23 in People -- in the Bobenal case, which was a court of
24 appeals published decision where the order read virtually
25 identical -- identically to this one, and the court of

1 appeals said it could -- would not be bound by its
2 original denial of leave for the lack of merits on the
3 grounds presented and reached the merits of the claim.

4 The same thing happened in -- in the Berry case
5 in which --

6 JUSTICE SOUTER: Well, that was the same court,
7 though, wasn't it?

8 MR. RESTUCCIA: Right.

9 JUSTICE SOUTER: But what -- what about
10 preclusion on other courts?

11 MR. RESTUCCIA: The --

12 JUSTICE SOUTER: In litigation in other courts.
13 They -- did -- did they ever say there is no claim or
14 issue preclusion in other courts as a result of -- of our
15 denials?

16 MR. RESTUCCIA: The court of appeals was only
17 examining its effect on itself, and wasn't examining on
18 subsequent courts.

19 JUSTICE SOUTER: And any -- any court, I mean,
20 in -- in theory, can -- can revise its own -- its own
21 opinions. But the -- I mean, we look to preclusion really
22 on -- on the effect of the judgment in another court, and
23 I take it they have not ruled on that.

24 MR. RESTUCCIA: Well, but both -- both opinions,
25 in Bobenal and Berry, the court said it was not a ruling

1 on the merits. In other words, if a subsequent court then
2 said it was a merits determination, it would be
3 inconsistent with the holding from Bobenal and it would be
4 inconsistent with Berry with saying the merits have not
5 been reached.

6 JUSTICE SCALIA: And they have said the same,
7 you tell us, as to Federal courts.

8 MR. RESTUCCIA: Right. The Federal courts
9 have --

10 JUSTICE SCALIA: I mean, that's another court,
11 and -- and they are not asserting that they've decided on
12 the merits in Federal court.

13 MR. RESTUCCIA: The Federal courts have been
14 ambiguous. In other words, the Abela case -- they said --

15 JUSTICE SCALIA: I'm not talking about what the
16 Federal courts have said. I'm talking about what -- what
17 Michigan has said and -- and what the court of -- has the
18 court of appeals spoken on that subject?

19 MR. RESTUCCIA: Yes. The court of appeals in
20 the Bobenal case said, in fact, examining virtually the
21 identical language of the issue raised here, that this was
22 not a decision on the merits and that it was not itself
23 bound as law of the case because the merits had not been
24 resolved.

25 I think the Bulger case is kind of the paramount

1 case because it is the Michigan Supreme Court conferring
2 the proper legal understanding of the applications for
3 leave, and it said that the nature of the leave is
4 discretionary. I think that fits with common sense
5 understanding because there is no right to have the merits
6 reviewed. Otherwise, it wouldn't make sense to say the
7 application were discretionary if a defendant would have a
8 claim to have any error corrected. Otherwise, he would
9 have a claim on the court of appeals. The court of
10 appeals has full authority to make the determination that
11 even if everything alleged is true, it's not going to
12 correct the error.

13 JUSTICE BREYER: Look, this is what I'm -- I'm
14 interested in. It seems like Michigan is unique here.
15 Why not do, if you're worried about resources, what other
16 States have done? You just say, okay, of course, you have
17 a right to an appeal and, of course, you have a lawyer.
18 We'll give it to you if you're poor. But, by the way, if
19 you want to plead guilty, we're not entering into that
20 deal unless you waive it.

21 MR. RESTUCCIA: Well, I think that, in a way,
22 Michigan provides a -- a greater protection by enabling
23 itself. What the court of appeals is essentially doing
24 with its review is for the -- for a case where there's a
25 -- an -- an egregious set of facts, it can reach in and

1 grant an application and review it on the merits. It's a
2 -- it's -- it's a kind of a determination about resource
3 allocation, making kind of the hard choices about policy
4 decisions that States have to make.

5 JUSTICE O'CONNOR: Is this a case where it would
6 meet the standard for granting leave to appeal?

7 MR. RESTUCCIA: No. This -- for -- for Mr.
8 Halbert --

9 JUSTICE O'CONNOR: Because of the error in
10 scoring?

11 MR. RESTUCCIA: In fact, anyone who's very
12 familiar with the Michigan guideline system would
13 recognize that Mr. Halbert, if anything, received a break
14 in the scoring of the guidelines. That -- that ultimately
15 the Offense Variable 13 is a very easy answer to why it
16 was properly scored.

17 JUSTICE O'CONNOR: You take the position that in
18 fact there was no error in scoring.

19 MR. RESTUCCIA: No. The -- there was no error
20 in scoring. The Offense Variable 13 claim relates to
21 three -- whether the defendant had committed three --
22 three offenses against a person within the -- within 5
23 years. Michigan allows a determination based on
24 preponderance even if there was no conviction entered.

25 Mr. Halbert was a serial child molester who

1 admitted to having sexually assaulted his 14-year-old
2 stepdaughter, a 10-year-old girl, a 6-year-old girl. All
3 that information was in the presentence investigation
4 report. There was no objection to the scoring of Offense
5 Variable 13 because he admitted to the sexual assault.
6 There was -- it was never raised --

7 JUSTICE STEVENS: I thought at page 36 of your
8 brief that you agreed that he made a correct -- that there
9 was an error in -- of application.

10 MR. RESTUCCIA: Right. The Offense Variable 9
11 was -- there was an error with respect to that, but it
12 wouldn't affect the ultimate position he would be placed
13 in the -- in the brackets. In fact, the only error that
14 did occur that would have affected the scoring was one in
15 his favor, which would have put him -- put him in a higher
16 bracket. So he in fact --

17 JUSTICE STEVENS: So there were at least two
18 errors. How they balance out I guess is your view they
19 didn't hurt him at all.

20 MR. RESTUCCIA: Well, in fact, if anything,
21 helped him. But on a more basic level --

22 JUSTICE STEVENS: Is that correct? There were
23 two errors in the --

24 MR. RESTUCCIA: Yes.

25 JUSTICE STEVENS: -- at least.

1 MR. RESTUCCIA: Yes.

2 JUSTICE STEVENS: And he contends there were two
3 more, and that hasn't been resolved.

4 MR. RESTUCCIA: That's -- that's right, but I --
5 I think those claims are --

6 JUSTICE STEVENS: So at -- at least we have to
7 assume that it was not an error-free sentencing
8 proceeding.

9 MR. RESTUCCIA: Yes.

10 Well, more importantly, the kinds of issues at
11 play for the sentencing cases are all like this. They --
12 they relate to the minimum sentencing. Michigan systems
13 then determine from a maximum -- from a minimum to a
14 maximum which will get a -- a range of time. All the --
15 these sentencing guideline cases relate to the minimum
16 sentence.

17 For Mr. Halbert as a sex offender, this is
18 really a question about when he will be eligible for
19 release from the Department of Corrections. He's going to
20 be facing 30 years because all the sentences in Michigan
21 are set by the statute. So these arguments relating
22 lesser liberty --

23 JUSTICE STEVENS: May I ask another question?
24 Am I correct in assuming from the order entered on page 43
25 of the joint appendix that even though there were lots of

1 errors there, the fact that they were not raised until
2 after December 11th would have precluded review at the
3 trial court level?

4 MR. RESTUCCIA: No. His -- the point of the
5 trial court there was that the defendant, if he wanted to
6 withdraw his plea, should have raised that before the
7 sentencing itself because the court has discretion before
8 sentencing to let him out of his plea. After sentencing,
9 he has to show that the plea was invalid. So his time --
10 he was untimely trying to withdraw his plea because he was
11 concerned about consecutive as against concurrent
12 sentences.

13 In -- in summary, the -- the Michigan system --
14 the -- with the limited date to the review and the kinds
15 of issues from plea-based convictions that are at issue
16 are not -- are lesser liberty interest questions because
17 they have to do with amount of punishment. The Michigan
18 system extends the relationship of trial counsel to the
19 defendant and asks the trial counsel to raise the motions
20 regarding post-conviction motions which will enable him to
21 have a factual record from which to advance his claims.
22 He's not left to shift for himself, that there is a
23 counsel appointed to identify those meritorious claims --

24 JUSTICE STEVENS: But if the counsel happens to
25 be incompetent, that's the end of the ball game.

1 is some advantage, but that's not the ultimate --

2 JUSTICE SCALIA: Competent paid counsel.

3 MR. RESTUCCIA: Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

5 Restuccia.

6 Mr. Schaerr, we'll hear from you.

7 ORAL ARGUMENT OF GENE C. SCHAERR

8 ON BEHALF OF LOUISIANA, ET AL.,

9 AS AMICI CURIAE, SUPPORTING THE RESPONDENT

10 MR. SCHAERR: Mr. Chief Justice, and may it
11 please the Court:

12 Like the Sixth Circuit's invalidation of this
13 Michigan statute in the Tesmer case, petitioner's attempt
14 to invalidate that statute here runs counter to this
15 Court's longstanding tradition of deference to the people
16 of the individual States and to their legislatures in the
17 design and implementation of their criminal justice
18 systems. As the Court said in Coleman v. Thompson, a case
19 like this is a case about federalism because it involves
20 the respect that Federal courts must pay to States and the
21 States' procedural rules.

22 Respect for the State's choices is especially
23 important here because, as the Court put it in Medina v.
24 California, preventing and dealing with crime is much more
25 the business of the States than it is of the Federal

1 Government. Therefore, the Court said we should not
2 lightly construe the Constitution so as to intrude upon
3 the administration of justice by the individual States.

4 And -- and as to the question of -- of when to
5 provide State-paid counsel, as Justice O'Connor reminded
6 us in *Murray v. Giarrratano*, that's a choice that should be
7 one of legislative choice, especially since it involves
8 difficult policy considerations and the allocation of
9 scarce legal resources.

10 JUSTICE BREYER: Now, I take it that the basic
11 rule that we've followed -- and this is what people are
12 arguing about -- could be a criminal trial or proceeding,
13 plea, something in a trial court.

14 MR. SCHAERR: Right.

15 JUSTICE BREYER: It emerges with a judgment, and
16 then there is going to be the first review. Call it a
17 leave to appeal, call it an appeal, call it whatever you
18 want, but it is the first review. And in those two
19 instances, State, if the defendant is poor, give him a
20 lawyer. That's simple. That's clear. Everybody could
21 understand it. They may not even have a lot of legal
22 arguments.

23 Now, what significant -- what does that prevent
24 a State from doing that it's reasonably important for a
25 State to want to do?

1 MR. SCHAERR: Well, again, Justice Breyer, it's
2 a question of allocating scarce legal resources. If you
3 -- and this case is a perfect example of that. This case
4 is not -- does not involve an appeal as of right. It
5 involves a discretionary appeal, and -- and that's the
6 vast bulk of -- of appeals that are addressed by the -- by
7 the Michigan Court of Appeals. So if you impose here on
8 the State of Michigan an obligation to provide counsel in
9 all of those cases, you are, in essence, forcing the
10 people of Michigan to reallocate their legal resources
11 away from other cases or you're requiring the legislature
12 to increase taxes to pay for that -- to pay for that --

13 JUSTICE BREYER: Is there any other State that's
14 done it the way Michigan has?

15 MR. SCHAERR: I don't believe there's another
16 State that's done it exactly the same way. But I -- but I
17 would point out -- and I think this is important, Justice
18 Breyer -- that -- that at least according to the Michigan
19 Supreme Court in the Bulger case, the majority of States
20 don't allow any appeal at all from a plea-based
21 conviction. 21 of them rule it out entirely and
22 expressly, and another 17 effectively rule out appeals
23 from plea-based convictions by -- by allowing prosecutors
24 to impose that -- impose a waiver as a condition of
25 entering into a plea. So -- so the relevant universe for

1 comparison is quite small here. It's really 12 States at
2 most, and -- and Michigan sort of fits within the middle
3 of those States in terms of the amount of resources that
4 it provides and opportunities that it provides.

5 JUSTICE STEVENS: Are you saying -- I just want
6 to be clear -- that even if this defendant had had paid
7 counsel, he would not have had any right to appeal to the
8 intermediate court?

9 MR. SCHAERR: That's correct. It -- it's
10 discretionary, and that's clear not just -- not just from
11 analysis of the -- of the Michigan courts' opinions, but
12 from the provision of the -- of -- but from the
13 constitutional provision that -- that created this entire
14 controversy, which was added in 1994. It's article I,
15 section 20. And that constitutional provision itself
16 draws a sharp distinction between appeals of right and
17 appeals by leave of court. So even if the Michigan courts
18 wanted to have a system of -- of mandatory appeals,
19 they're now precluded by the Michigan constitution from
20 doing that.

21 And so -- and so clearly, if this Court adheres
22 to the sharp distinction and -- which I think is equally
23 sharp and clear, that this Court has made between --
24 between appeals of right and discretionary appeals --

25 JUSTICE GINSBURG: But it's not that -- it's not

1 that sharp because it was -- in Ross, it was the second
2 appeal. So here we have one factor that is like Douglas,
3 Griffin, and one factor that's like Ross. You can't say
4 that it falls in one camp more than the other. This is
5 the first-tier appeal.

6 MR. SCHAERR: I -- I understand, Justice
7 Ginsburg, but -- but that's not the distinction that I
8 understand this Court's decisions draw. Several times
9 since Douglas and Ross, this Court has said that the right
10 to paid counsel addressed in Douglas extends only to the
11 first appeal of right and no further. And that's --
12 that's Coleman and -- and Finley, among others.

13 JUSTICE STEVENS: Of course, the question is
14 whether the words, of right, were essential to that
15 statement.

16 MR. SCHAERR: I -- I'm assuming that the Court
17 was being careful in its -- in its choice of words, and I
18 believe it was because that -- that --

19 JUSTICE STEVENS: Because then it wouldn't have
20 needed to include the word first.

21 MR. SCHAERR: I'm sorry?

22 JUSTICE STEVENS: But then the word first was
23 redundant, not the words, of right.

24 MR. SCHAERR: No, I don't --

25 JUSTICE SCALIA: You can have two appeals of

1 right --

2 MR. SCHAERR: That's right.

3 JUSTICE SCALIA: -- I suppose if you wanted to.

4 MR. SCHAERR: That's right.

5 Now, so -- so the real question here, with
6 regard to the right to paid counsel, is does it make sense
7 to extend what the Court did in Douglas to this new
8 situation. We think it does not. This Court's decisions,
9 Ross and Justice Kennedy's concurrence in -- in Murray, as
10 I recall, draw -- draw a distinction between the removal
11 of barriers that the State imposes to the exercise of
12 litigation rights on the one hand and, on the other hand,
13 subsidizing, affirmatively subsidizing litigation rights

14 And -- and I think this Court's care in
15 distinguishing between appeals of right and discretionary
16 appeals reflects a desire to cabin Douglas and -- and to
17 avoid any further excursions into the area of subsidies.
18 And we think that's a -- we think that's -- we think
19 that's good as a matter of policy for the Court to do
20 that, for one thing --

21 JUSTICE SOUTER: May -- may I ask you one thing
22 lest we forget it? Is -- is your argument premised on the
23 assumption that a refusal to hear an appeal is -- is not
24 regarded as a determination on the merits and thus
25 preclusive?

1 MR. SCHAERR: No, I don't think so. I -- I
2 think that helps the argument. But in fact, there are
3 lots of discretionary appeals or discretionary appellate
4 proceedings that -- that do result in decisions on the
5 merits. This Court, for example, sometimes summarily
6 affirms or reverses on cert, and the fact that the Court
7 does that doesn't create --

8 JUSTICE SCALIA: Well, we accept cert before we
9 do that. I thought the question was that the denial of an
10 application for appeal does not have any merits
11 consequence. Wasn't that the question?

12 JUSTICE SOUTER: Yes, yes.

13 JUSTICE SCALIA: Does the denial of an
14 application for appeal have any merits consequence?

15 MR. SCHAERR: Well, as -- if -- if that's the
16 question, I -- I would defer to -- to Michigan counsel --

17 JUSTICE SOUTER: No. But I'm asking whether
18 that's a premise of your argument because the consequences
19 of your argument are going to be very different depending
20 on whether that is the premise or whether it isn't,
21 whether that premise is true or whether it isn't.

22 MR. SCHAERR: I -- I think the distinction is --
23 is not necessarily whether the decisions are on the merits
24 or not. I think the distinction is between appeals of
25 right and -- and appeals that are discretionary.

1 JUSTICE SCALIA: If it's always on the merits,
2 it's an -- it's an appeal of right, it seems to me. How
3 can you have a -- a discretionary appeal which always
4 decides the merits of the case?

5 MR. SCHAERR: Well, I -- in -- in fact, I don't
6 think that's what happens in Michigan, and -- and I think
7 the --

8 JUSTICE SOUTER: So your -- the assumption of
9 your argument is that it is not on the merits. I.e., it
10 is not a merits determination if there's a denial and
11 hence there is no preclusion.

12 MR. SCHAERR: I -- I think that's true. Whether
13 it's an assumption of the argument, I'm not -- I'm not so
14 sure.

15 JUSTICE BREYER: You're talking about a piece of
16 paper, that first piece of paper saying to the appeals
17 court, appeals court, please hear my appeal.

18 MR. SCHAERR: Right.

19 JUSTICE BREYER: And then it lists a whole lot
20 of reasons like a cert petition.

21 MR. SCHAERR: Right.

22 JUSTICE BREYER: And those are likely to do with
23 the merits of the case. I mean, they'll tell all the
24 horrible things that went on. And the question is, is he
25 going to have a lawyer to help him with that piece of

1 paper or not?

2 MR. SCHAERR: That's right.

3 JUSTICE BREYER: All right. Now -- now, it
4 sounds to me just the kind of thing you'd write if you had
5 an appeal on the merits too. No. It's even harder. Even
6 harder. You've got to convince them to take it.

7 MR. SCHAERR: It -- it is more difficult, but --
8 but the disparity between --

9 JUSTICE BREYER: So why draw that distinction?
10 The piece of paper is the same, even harder to write,
11 needs the lawyer as much, first chance he gets after the
12 trial court. Why draw that distinction?

13 MR. SCHAERR: Well, again, because -- because if
14 you -- if you broaden the right to State-paid counsel, as
15 -- as in Douglas, you're going to require States to -- to
16 reallocate resources to that priority and away from other
17 priorities.

18 Also, if you -- if you subsidize litigation in
19 the name of providing adequate access to courts or
20 meaningful access to courts, then there's going to be a
21 lot of litigation in the lower Federal courts about
22 exactly how much of a subsidy is necessary reach that
23 standard.

24 And also, if -- and this is particularly
25 important here I think. If you require States to

1 subsidize the exercise of a right that they're not
2 required to provide in the first place, like the right to
3 seek review of a -- of a plea-based conviction, then you
4 give the States a strong incentive to cut back on or
5 eliminate that right altogether. And -- and, you know,
6 who knows? But perhaps that's what's going on in the --
7 in the trend in the States away from providing this right.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Schaerr.

11 Mr. Moran, you have 3 minutes remaining.

12 REBUTTAL ARGUMENT OF DAVID A. MORAN

13 ON BEHALF OF THE PETITIONER

14 MR. MORAN: Thank you.

15 I have to begin by correcting several
16 misstatements of fact and of Michigan law. First of all,
17 Mr. Schaerr just said that only a dozen States, I believe,
18 allow for appeals from guilty pleas. That's not correct.
19 Every State in the United States currently allows for
20 appeals from guilty plea -- pleas.

21 The Bulger case did say that. They cited a --

22 JUSTICE KENNEDY: Appeals as of right?

23 MR. MORAN: Not necessarily. As I cited in my
24 brief, a number of States allow for applications or
25 petitions from guilty pleas, but every State has a first-

1 tier direct appeal from guilty pleas. The Bulger -- the
2 Michigan Supreme Court in Bulger cited a -- an article
3 from an Arizona Attorney magazine that was simply
4 incorrect on that.

5 Secondly, on the issue of what is the effect of
6 a order denying leave to appeal for lack of merit on the
7 grounds presented, the State continues to rely on McKenzie
8 v. Smith, an earlier Sixth Circuit opinion, People v.
9 Berry, and Bobenal v. Saginaw Investment. None of those
10 cases uses the phrase, lack of merit on the grounds
11 presented. That phrase does not appear in any of those
12 three cases.

13 The Berry and the Bobenal cases, those are
14 Michigan Court of Appeals cases before 1981. Beginning in
15 1981, in a series of three cases, People v. Douglas,
16 People v. Hayden, and People v. Wiley, the Michigan Court
17 of Appeals held unambiguously that our orders denying
18 applications or remand orders, in that case, for lack of
19 merit on the grounds presented, was law of the case.

20 JUSTICE SCALIA: What's the effect of the
21 constitutional provision then?

22 MR. MORAN: I'm sorry? I -- I don't --

23 JUSTICE SCALIA: If that's so, what is the
24 effect of the constitutional provision that Mr. Schaerr
25 read?

1 MR. MORAN: The Michigan constitutional
2 provision? It changes the way in which guilty plea
3 appeals proceed. Before 1994, there were other types of
4 appeals that had to proceed by application for leave to
5 appeal, primarily latent appeals. If the appeal was filed
6 too late, it had to proceed by application for leave to
7 appeal.

8 In 1994, as a result of the constitutional
9 amendment, guilt plea appeals now have to proceed by
10 application for leave to appeal. That's constitutional.
11 We have no problem with that, and that is the method by
12 which the caseload management problems have been solved.
13 They have been solved.

14 JUSTICE SCALIA: I -- I -- you -- you have the
15 wrong one. I meant the one that said that applications to
16 the court of appeals are -- are -- require leave to
17 appeal. What's the effect of that?

18 MR. MORAN: The -- I assume you're still
19 referring to article I, section 20 of the Michigan
20 constitution.

21 JUSTICE SCALIA: Yes. It says that for the
22 court of appeals, you need leave to appeal. I thought
23 they were doing something there. What were they doing?

24 MR. MORAN: They were saying that first-tier
25 felony appeals in Michigan following pleas require leave

1 of the court, require an application for leave to appeal,
2 like latent appeals from trial cases do. But all of those
3 appeals are still decided on the merits with preclusive
4 effect for law of the case purposes. And the Sixth
5 Circuit specifically dealt with that in -- in the Abela
6 case. McKenzie v. Smith never -- never mentions anything
7 about the lack of merit in the grounds presented.

8 The resource allocations point is simply that
9 not all of these guilty plea appeals are -- lead to full
10 argument and full briefing, and that's fine. Michigan can
11 do that. But what Michigan cannot do, as a result of
12 Ellis and Douglas, is for that first gatekeeping part of
13 the appeal, which is where the court has to decide is
14 there merit in this case, to make the indigent shift for
15 himself. And so in -- in Smith v. Robbins, this Court,
16 specifically referring back to the Ellis case, said that
17 the problem that the Court identified in Ellis and that
18 became part of the constitutional minimum in Douglas, was
19 that the old California procedure did not require -- I see
20 my time is up.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Moran.

23 The case is submitted.

24 (Whereupon, at 11:04 a.m., the case in the
25 above-entitled matter was submitted.)